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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

against

YABUCOA SUGAR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR RESPONDENT.

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Pursuant to leave granted on the hearing of this case Respondent respectfully submits the following observations on the points covered by Petitioner's Reply Brief:

Points I and II.

The contention of Respondent which is criticised (Petitioner's Reply Brief 1-3) is directed solely to the question raised by Petitioner himself:—that complaint does not state facts sufficient to constitute a cause of action. Respondent's position is that since the demurrer was sustained in the District Court and affirmed by the Supreme Court solely

on jurisdictional grounds and without consideration of the sufficiency of the facts, the question should not be passed upon by this court for the first time. Certainly if the case had rested on this ground in the court below Respondent would have been given the opportunity to amend. Nevertheless, in order squarely to meet Petitioner in this contention, we answered the point raised, in order to show that demurrer should not be sustained on this ground since the Board of Review and Equalization had ample power to make a complete reexamination of the return, and its decision in favor of the taxpayer is at least tantamount to a *prima facie* case which the Treasurer can only meet by affirmative allegations in an answer and not by demurrer.

POINT III.

Respondent does not contend, as might be inferred from the observations made on page 3 of the Reply Brief, that the authority delegated to Treasurer is discretional and therefore unconstitutional. Respondent's position is that the Treasurer is under a *mandatory* obligation to determine the correct amount of the tax and to credit or return to the taxpayer any overpayment as commanded by Sections 54, 55, 64 and 75 of the law, and that therefore the Legislature, in the absence of a positive prohibition, did not intend that access to the Courts should be denied.

United States v. *Babcock*, 250 U. S. 328, which Petitioner discusses at length (pp. 5 and 6) not only is distinguished by its own language but the distinction is emphasized in the sentence from the opinion of Mr. Justice Stone, in *United States* v. *Dismuke*, 297 U. S. 167, 172, omitted by asterisks in the quotation on page 22 of Petitioner's main brief.

What Petitioner does not point out in quoting from *United States* v. *Babcock* is that the decision there is rested

solely on the positive language of the statute expressly denying access to the courts:

> **"That any claim which shall be presented and acted on under authority of this act shall be held as finally determined and shall never thereafter be reopened or considered."** (p. 331.)

What the court held in the Babcock case was that Congress could, and in effect did by that provision, limit and expressly exclude the right of recourse to the courts. There is no provision whatever in the Puerto Rican Income Tax Act of 1924 which makes the Treasurer's decision on a claim for credit or refund final, or from which such finality can be inferred.

The *Dismuke* case, in which the *Babcock* case is expressly distinguished, was brought under the Tucker Act permitting suits against the United States and which confers jurisdiction on the Courts to try claims "*founded upon any law of Congress,* or upon any regulations, etc." The Court said (p. 169):

> "Section 8 (a) of the Retirement Act declares that, under certain conditions specified the employee 'shall be entitled to an annuity payable from the Civil Service retirement and disability fund'. The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim 'founded upon a law of Congress' and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to 'pay' or 'repay'."

The contention had been made in that case and had prevailed in the District Court, just as it has been made here, and as Judge Morton maintained in his dissenting opinion in the Circuit Court, that the District Court was without jurisdiction because the Retirement Act must be

construed as committing the adjudication of claims under it solely to administrative officers to the exclusion of the Courts. It was argued that prohibition to bring suit was implied under the administrative provisions of the Act in question just as it is here urged. Yet this Court, after distinguishing the *Babcock* case as one where review by the Courts was *expressly* prohibited, proceeded to hold that "in the absence of *compelling* language, resort to the Courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer" (p. 172). This Court then proceeded at length to define the limitation of such authority.

Sections 54, 55 and 64 of the Income Tax Law are as imperative as the Section of the Retirement Act which this Court held in the *Dismuke* case to be a "law of Congress" under which suit might be brought.

The same contention which was made in the *Dismuke* case was made and rejected by this Court in *United States* v. *Hvoslef*, 237 U. S. 1, and in *United States* v. *Laughlin*, 249 U. S. 440, both of which cases are cited in our main brief. In all of these cases this Court held that the section of the law commanding the public officer to take the action under discussion was the "law of Congress" upon which the claim was founded under the Tucker Act.

Judge Morton in his dissenting opinion in this case thought that the words "according to the provisions of law in that regard" in Section 76 (b) referred to "no suits or proceedings" and concluded that there was no such law apart from that section (R. 35). While we think it is clear that the words "according to the provisions of law in that regard" refer to the filing of the claim for credit or refund (Brief 18), even if Judge Morton had been correct in his grammatical construction, the "law in that regard" in this case is just as completely established by Sections 54, 55, 64 and 76 of this Act as the "law of Congress" which brings the cases above referred to, under the Tucker Act.

Certainly it cannot be said in view of these cases that there is no law in this case upon which the suit provided for in Section 76 (b) is founded.

We fully agree with the principles laid down in the *Dismuke* case as quoted on p. 6 of the Reply Brief, with respect to the extent to which the Court may review the action of the public officer *once jurisdiction is taken by the Court.* The important thing is that the Court *did take jurisdiction.*

The *Laughlin* case cannot be distinguished, as Petitioner attempts to do on page 4, on the ground that only questions of law were involved. Once jurisdiction of the Court is conceded, the only questions normally involved in any case are whether or not the public officer applied the proper principles of law to a particular state of facts, and whether or not the official in question has exceeded "his authority by making a determination which is arbitrary or capricious or unsupported by evidence" as stated in the *Dismuke* case.

The *extent of the review* is an entirely subsidiary matter and may vary under different circumstances. For example in this case the Treasurer has been reversed by the Board of Review but it is the *Treasurer* who is being sued. That might alter the extent to which the Trial Court would be compelled to accept his findings of fact. We submit, however, that this is a point which might well be left to the Puerto Rican Courts to decide in case they are directed by this Court to take jurisdiction.

We certainly cannot agree, as Petitioner urges on page 5 that only questions of fact are involved in this case. We do not know what legal principles may arise. In fact it is not at all unlikely, if the case is sent back, that a question of law will immediately arise, namely the presumption to be derived from a decision by the Board adverse to the Treasurer.

POINT IV.

In his main brief Petitioner contends that Section 76 (b) is a "negative pregnant" and not an affirmative grant of power (p. 23). He now maintains (Reply Brief, p. 7) that it "was enacted by the Legislature for a very important purpose, viz., that of emphasizing and driving home the legislative intent that there should be no recourse to the courts from decisions of the Treasurer under Section 75[1] on petitions for refund of supposed overpayments of taxes made voluntarily and without protest or objection of any kind".

The argument now made is not consistent with the previous argument and the suggested intention is not supported by the context.

If the Legislature had desired to drive home the suggested intent it is more probable that Section 76 (b) would have read simply and straightforwardly:

> "(b) No suit or proceeding shall be brought to recover an overpayment."

Conclusion.

The only reasonable interpretation of Section 76 (b), if it is to be given any meaning at all, is that it was inserted as an independent part of Section 76 following Section 76 (a),—in what is now made a separate title of the Act (and it is by no means a *sub-section* of 76 (a), either by virtue of its position in the statute or by its subject matter) with the intention that it should perform the same function as was performed in the 1919 Act by the second paragraph of Section 66, which, for this reason, is omitted in the 1924 Act.

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[1] Claims for refund or credit referred to in Section 76(b) are provided for by Section 64 (b) and not by Section 75.

Any other construction places the administrative officer in the performance of the task which he is ordered in no uncertain terms to perform, beyond the control of the Courts. In the absence of any provision in the statute, to that effect, it is difficult to believe that the Legislature intended to have given the Treasurer such uncontrolled power.

Respectfully submitted,

EARLE T. FIDDLER,
Attorney for Respondent.

Washington,
March 8, 1939.